(c) before or within seven days after the commencement of the proceedings in which judgment was given, the insurer had notice of the proceedings.

The plaintiff denied liability to the 2nd defendant. It specifically pleaded that the 2nd defendant had not complied with paragraph (a) of subsection (2) of section 9, which means that it disputed condition (c) above (it did not dispute the other two conditions). But at the hearing it abandoned this defence. In view of this there should have been automatic judgment allowing the 2nd defendant's counterclaim against the plaintiff.

As regards condition (b), judgment was obtained by the 2nd defendant, it was obtained against a person insured by the policy issued by the plaintiff, that judgment has not been appealed, it remains a good judgment of the court, the 2nd defendant is entitled to its benefit, therefore the plaintiff must pay to the 2nd defendant all the sum payable under it.

We therefore make the following orders:

1. That the plaintiff's appeal be dismissed with costs here (the plaintiff to pay the defendant's costs in the court below also);
2. That the 2nd defendant's cross appeal be allowed with costs here and below. The plaintiff to pay the 2nd defendant the amount payable under the judgment (dated June 24, 1974) obtained by him against the 1st defendant by way of damages, interest and costs in Civil Suit No. K. 46 of 1970;
3. Half of the appellant's deposit to be paid to each of the defendants against the defendants' taxed costs.

Order accordingly.

Solicitors: *Ee, Lim & Leong; Ibrahim & Co.; Thomas & Co.*

PUBLIC PROSECUTOR v. KHONG TENG KHEN & ANOR.

[F.C. (Suffian L.P., Ong Hock Sim and Wan Suleiman F.JJ.) August 14, 1976]

[Kuala Lumpur — Federal Court Special Case No. 1 of 1976]

Constitutional Law — Emergency — Validity of Emergency (Security Cases) Regulations, 1975 — Power of Yang Dipertuan Agung to make Ordinances — Whether Parliament sitting — Power to make regulations inconsistent with the Constitution — Validity of regulations — Emergency (Essential Powers) Ordinance, 1969 — Federal Constitution, Arts. 149 and 150.

The accused persons in this case had been charged for possession of firearms and ammunition contrary to section 57(1) of the Internal Security Act. They were committed for trial in the High Court after a preliminary inquiry. The Attorney-General under the provisions of the Emergency (Security Cases) Regulations 1975 certified that the offences were security offences and the accused were than liable to be tried under the 1975 Regulations in accordance with the special rules of evidence and procedure enacted by the Regulations. Counsel for the accused sumbitted that the trial should be held under the ordinary provisions of the Criminal Procedure Code and not under the 1975 Regulations, on the ground that those Regulations were unconstitutional and void. The learned trial judge, being of opinion that a question had arisen as to the effect of provisions of the Constitution, stopped the proceedings and referred the question of the validity of the 1975 Regulations to the Federal Court. The question posed was as follows:—

"Are the Essential (Security Cases) Regulations, 1975 and the Essential (Security Cases) (Amendment) Regulations 1975 invalid for any of the following grounds:—

(a) that the Regulations were made when both Houses of Parliament have sat after the Proclamation of Emergency on May 15, 1969, in contravention of Clause (2) of Article 150 of the Federal Constitution which empowers the Yang Dipertuan Agung to promulgate Ordinances only until both Houses of Parliament are sitting;

(b) that the Regulations are inconsistent with certain provisions of the Federal Constitution and Clause (6) of Article 150 of the Constitution (which provides that no provision of any Ordinance promulgated under that Article and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shal be invalid on the ground of inconsistency with any provision of the Federal Constitution or of the Constitution of the State Sarawak) does not extend to the Regulations, on the ground that the Regulations are not such an Ordinance but merely subsidiary legislation made under such an Ordinance;

(c) that the Regulations were made under sections 2(3) and 2(4) of the Emergency (Essential Powers) Ordinance No. 1 of 1969 and these sections are invalid in so far as they purport to delegate power to legislate provisions inconsistent with the Constitution whereas Clause (2) of Article 150 of the Federal Constitution does not empower the Yang Dipertuan Agung to provide for such delegation;

(d) that since the Regulations provide for procedure of trial of offences against the Internal Security Act, 1960 which has been enacted pursuant to Article 149 of the Federal Constitution (under which Article any law made pursuant to it is valid even if inconsistent with Articles 5, 9 or 10 of the Federal Constitution but not if inconsistent with other provisions of the Federal Constitution) the Regulations must conform with Article 149, but they do not conform with that Article in that they are inconsistent with the provisions of the Federal Constitution other than Articles 5, 9 and 10;

(e) that the Regulations were made under the Emergency (Essential Powers) Ordinance No. 1 of 1969 and that Ordinance was not properly or validly promulgated under Clause 2 of Article 150 of the Federal Constitution.

Held, Suffian L.P. and Wan Suleiman F.J. (Ong Hock Sim F.J. dissenting): that the Essential (Security Cases) Regulations 1975 and the Essential (Security Cases) (Amendment) Regulations, 1975, are valid because —

(a) the Regulations were made not under Clause (2) of Article 150 of the Federal Constitution but under section 2 of the Emergency (Essential Powers) Ordinance, 1969, and therefore the fact whether or not they were made when Parliament was sitting was irrelevant;

(b) by virtue of subsection (4) of section 2 of the Emergency (Essential Powers) Ordinance, 1969, the regulations were valid notwithstanding that they are inconsistent with the Constitution, but in fact it had not been shown that the regulations were inconsistent with the Constitution;

(c) it is lawful for the Yang Dipertuan Agung to delegate under section 2 of the Ordinance power to himself to make regulations inconsistent with the Constitution;

(d) the regulations do not have to comply with Article 149 of the Federal Constitution as they were made not under the authority of that Article but under the authority of Article 150;

(e) the Emergency (Essential Powers) Ordinance, 1969, were properly and validly promulgated under Clause (2) of Article 150 of the Federal Constitution;

(f) the Regulations were not *ultra vires* section 2 of the Emergency (Essential Powers) Ordinance, 1969, as the power to make regulations under subsection (2) of section 2 is expressed to be without prejudice to the generality of the powers conferred by subsection (1) of section 2 which gives the Yang Dipertuan Agung wide powers to "make any regulations whatsoever which he considers desirable or expedient for securing the public safety, the

defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community" and also because paragraph (j) of section 2(2) of the Ordinance expressly gives power to the Yang Dipertuan Agung to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification.

Cases referred to:-

(1) *N. Madhavan Nair* v. *Government of Malaysia* [1975] 2 M.L.J. 286.

(2) *Osman & Ors.* v. *Public Prosecutor* [1968] 2 M.L.J. 137.

(3) *Kedar Nath* v. *State of West Bengal* A.I.R. 1953 S.C. 404, 406.

(4) *Long bin Samat & Ors* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(5) *Eng Keock Cheng* v. *Public Prosecutor* [1966] 1 M.L.J. 18, 20.

(6) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 424.

(7) *Rex* v. *Halliday* [1917] A.C. 260, 264, 287.

(8) *Berney* v. *Attorney-General* [1947] L.J.R. 983, 989.

(9) *Liversidge* v. *Anderson & Anor.* [1941] 3 All E.R. 338.

(10) *In re Mae Manaway* [1951] A.C. 161, at p. 169.

FEDERAL COURT.

Abu Talib bin Othman and *Datuk Haji Abdullah Ngah*, Senior Federal Counsel for the plaintiff.

A. Wilson, Lim Kean Chye and *Ten Chin Yong* for the defendants.

Suffian L.P.: This a reference of a constitutional question by the High Court, Kuala Trengganu, under section 48 of the Courts of Judicature Act No. 7 of 1964, of which subsection (1) reads: —

"Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court."

We are asked to rule on the validity of the Essential (Security Cases) Regulations, 1975 (published as P.U. (A) 320/75) as amended by the Essential (Security Cases) (Amendment) Regulations, 1975 (published as PU(A) 362/75). I shall refer to these regulations simply as the 1975 regulations.

Parliament was dissolved on March 20, 1969, and a general election was held on the following Saturday, May 10. On Tuesday, May 13, three days after the general election, there were riots in Kuala Lumpur. Two days later the Yang Dipertuan Agung proclaimed a state of emergency under Article 150 of the Constitution.

The relevant provisions of that article are clauses (1), (2), (3) and (6) which read as follows: —

"150 (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may isssue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak."

The Proclamation of Emergency (published as P.U. (A) 145/69) reads as follows: —

"WHEREAS WE are satisfied that a grave Emergency exists whereby the security of the Federation is threatened;

AND WHEREAS Article 150 of the Constitution provides that in the said circumstances WE may issue a Proclamation of Emergency:

NOW, THEREFORE, WE, Tuanku Ismail Nasiruddin Shah ibni Al-Marhum Al-Sultan Zainal Abidin by the Grace of Allah of the States and territories of the Federation Yang di-Pertuan Agong in exercise of the powers aforesaid do hereby proclaim that a State of Emergency exists, and that this Proclamation shall extend throughout the Federation.

GIVEN at Our Istana Negara in Our Federal Capital of Kuala Lumpur, this Fifteenth day of May, 1969.

By His Majesty's Command,

TUNKU ABDUL RAHMAN PUTRA AL-HAJ,
Prime Minister."

At the same time His Majesty promulgated an Ordinance under clause (2) of Article 150, known as Emergency (Essential Powers) Ordinance, 1969, Ordinance 1 (published as P.U. (A) 146/69). I shall refer to this simply as the Ordinance.

The relevant provisions of the Ordinance read as follows: —

"WHEREAS by reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under Article 150 of the Constitution:

AND WHEREAS Parliament was dissolved on the Twentieth day of March, 1969, and elections to the new Dewan Ra'ayat have not been completed;

AND WHEREAS the Yang di-Pertuan Agong is satisfied that immediate action is required for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community;
IT IS HEREBY ENACTED by [the Yang di-Pertuan Agong] pursuant to Clause (2) of Article 150 of the Constitution as follows:

1. This Ordinance may be cited as the Emergency (Essential Powers) Ordinance, 1969 and shall have application throughout Malaysia;

2. (1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding subsection, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that subsection —

(a) make provisions for the apprehension, trial and punishment of persons offending against the regulations, and

for the detention, exclusion and deportation of persons whose detention, exclusion or deportation appears to the Minister for Home Affairs to be expedient in the interests of the public safety or the defence of Malaysia;

(b) create offences and prescribe penalties (including the death penalty) which may be imposed for any offence against any written law (including regulations made under this Ordinance);

(c) provide for the trial by such courts as may be specified in such regulations, of persons guilty of any offence against the regulations;

X X X X

(j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;

(4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Ordinance or in any instrument having effect by virtue of any written law other than this Ordinance."

I pause here to observe that under clause (4) of article 55 after Parliament has been dissolved a general election must be held within 60 days in Peninsular Malaysia and within 90 days in Sabah and Sarawak — which was done in 1969 — and Parliament must be summoned to meet on a date not later than 120 days from that date but that was not done. Also, it will be recalled that under clause (2) of article 150 after a proclamation of emergency has been issued when Parliament is not sitting — which was the case in 1969 — the Yang Dipertuan Agung must summon Parliament as soon as may be practicable; but His Majesty did not however summon Parliament as soon as was practicable after issuing the proclamation of emergency. I do not, however, think that this in any way affects the validity of the proclamation, because by section 7 of the Ordinance His Majesty expressly ordered the suspension of uncompleted elections to Parliament until such date as he might determine, and Emergency (Essential Powers) Ordinance No. 3, 1969 (published as P.U. (A) 170 of 1969) added subsection (3) to the above section 7 providing that after the 1969 dissolution Parliament shall meet not on the date prescribed by clause (4) of article 55, but on a date to be determined by His Majesty.

On Saturday, October 4, 1975, in exercise of the powers conferred by section 2 of the Ordinance, His Majesty made the regulations the validity of which is in question. They were published in the *Gazette* on the day they were made.

On November 1, 1975, in exercise of the same powers His Majesty amended these regulations by the Essential (Security Cases) (Amendment) Regulations, 1975. These amending regulations were published in the *Gazette* on November, 4, 1975.

Under section 57(1) of the Internal Security Act, Act 82, enacted long before the 1975 Regulations, it is an offence punishable with death for a person to have in his possession without lawful excuse in a security area any firearm or ammunition without lawful authority. That section reads as follows: —

"Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control —

(a) any firearm without lawful authority therefor, or

(b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence and shall, on conviction, be punished with death."

Regulation 2 of the 1975 regulations makes a case involving a charge under section 57(1) a "security case", by providing as follows: —

"2. (1) 'security case' means a case where a person is charged with a security offence; and

'security offence' means an offence (whether committed before or after the commencement of these Regulations) against section 57 . . . of the Internal Security Act, 1960, or any offence against any other written law the commission of which is certified by the Attorney-General under paragraph (2) to affect the security of the Federation:

(2) Where the commission of any offence against any written law other than sections 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations."

Regulation 3 provides as follows: —

"3. (1) These Regulations shall have effect with respect to security cases notwithstanding anything to the contrary contained in any written law; but, except in so far as the same are varied by these Regulations, the ordinary practice and procedure, where appropriate, shall apply to security cases.

(2) If any proceedings in respect of any case which by virtue of these Regulations has become a security case, have commenced before the coming into force of these Regulations, such proceedings shall be deemed to have been held under these Regulations and shall be valid and be continued in accordance with these Regulations."

It will be noted that these regulations as amended came into force on November 1, 1975, *i.e.* after the coming into force of the Internal Security Act.

Before the regulations came into force, namely on October 22, 1974, the two persons accused in this case were, it is alleged, in possession of firearm and ammunition contrary to section 57(1) of the Internal Security Act, and the first accused was charged with an offence under section 57(1)(a) and of another offence under section 57(1)(b) of the Act. The second accused was similarly charged with two offences.

They were committed for trial in the High Court after a preliminary enquiry in the ordinary way under the Criminal Procedure Code. By the time they appeared in the High Court for trial, the 1975 Regulations had come into force and the prosecution elected to charge them not simply under section 57(1) of the Act, but with having committed security offences as defined in regulation 2(1) of the 1975 Regulations. If the prosecution could do that, then the accused would have been tried, as provided by regulation 3(1) and (2) of the 1975 Regulations, in accordance with the special rules of evidence and procedure enacted by those regulations.

At the beginning of the trial Mr. Wilson for the accused raised a preliminary objection. He submitted that the trial should be held under the ordinary provisions of the Criminal Procedure Code and not under the 1975 Regulations, because (he said) those regulations are unconstitutional and void.

The learned trial judge, being of opinion that a question had arisen as to the effect of provisions of the constitution, stayed the proceedings and referred the question of the validity of the 1975 Regulations to this court. He posed the question as follows: —

"Are the Essential (Security Cases) Regulations, 1975, and the Essential (Security Cases) Amendment) Regulations, 1975, invalid for any of the following reasons:—

(a) that the Regulations were made when both Houses of Parliament have sat after the Proclamation of Emergency on May 15, 1969, in contravention of Clause (2) of Article 150 of the Federal Constitution which empowers the Yang di-Pertuan Agong to promulgate ordinances, only until both Houses of Parliament are sitting;

(b) that the Regulations are inconsistent with certain provisions of the Federal Constitution and Clause 6 of Article 150 of the Constitution (which provides that no provision of any ordinance promulgated under that Article and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of the Federal Constitution or of the Constitution of the State of Sarawak) does not extend to the Regulations, on the ground that the Regulations are not such an ordinance but merely subsidiary legislation made under such an ordinance;

(c) that the Regulations were made under sections 2(2) and 2(4) of the Emergency (Essential Powers) Ordinance No. 1 of 1969, and those sections are invalid in so far as they purport to delegate to legislate provisions inconsistent with the Constitution whereas Clause (2) of Article 150 of the Federal Constitution does not empower the Yang di-Pertuan Agong to provide for such delegation;

(d) that since the Regulations provide for procedure of trial of offences against the Internal Security Act 1960 which has been enacted pursuant to Article 149 of the Federal Constitution (under which Article any law made pursuant to it is valid even if inconsistent with Articles 5, 9 or 10 of the Federal Constitution but not if inconsistent with other provisions of the Federal Constitution) the Regulations must conform with Article 149, but they do not conform with that Article in that they are inconsistent with the provisions of the Federal Constitution other than Articles 5, 9 and 10;

(e) that the Regulations were made under the Emergency (Essential Powers) Ordinance No. 1 of 1969 and that Ordinance was not properly or validly promulgated under Clause 2 of Article 150 of the Federal Constitution."

Taking ground (e) first, Mr. Wilson argues that the Ordinance was not properly and validly promulgated and that therefore the 1975 Regulations are also invalid. He uses the arguments used in *N. Madhavan* v. *Government of Malaysia*.[1] Those arguments were thoroughly discussed and considered by Chang Min Tat J., in that case, who decided that the Ordinance was properly and validly promulgated. Mr. Wilson argues that as the affidavits used in that case are not tendered in this case, the prosecution cannot therefore say that the Ordinance was properly and validly promulgated. I respectfully agree with the learned trial judge in the instant case that the court can take judicial notice of the affidavits reproduced in Chang Min Tat J.'s judgment and that relying on those affidavits the court can and should conclude that the Ordinance was properly and validly promulgated.

Before stating and considering Mr. Wilson's next argument, which is listed above as ground (a), it is necessary to state that because of the death of a candidate and also because polling in Sabah and Sarawak was staggered over several days, the 1969 general elections was not completed by May 13, 1969, so that on that day there was no House of Representatives, and consequently in my view no Parliament, because Parliament consists of three elements — namely, the Yang Dipertuan Agung, the Senate (which is not affected by a dissolution) and the House of Representatives. The uncompleted election was however ordered to be resumed by Emergency (Essential Powers) Ordinance No. 32 of 1970 (published as P.U. (A) 143 of 1970) in 1970, and it was resumed and completed, and the first sitting of Parliament was held on February 20, 1971.

It is to be observed that when a proclamation of emergency is in force the Government has two ways in which to make law—

(a) Parliament itself may legislate, if it is sitting; and

(b) if Parliament is not sitting, then the executive in the person of His Majesty (acting on responsible advice) may promulgate Ordinances having the force of law, if His Majesty is satisfied that immediate action is required. In that event the regular legislature is not altogether left out, because clause (3) of Article 150 requires these Ordinances to be laid before both Houses of Parliament and Parliament then has power to resolve that they be annulled.

With this background in mind, Mr. Wilson argues (and the learned trial judge agrees) that as at the time when the 1975 regulations were made Parliament had sat there was a Parliament in existence and that being so only Parliament (not His Majesty) had then power to make these regulations and that as they were made by His Majesty who had no power to do so, they were accordingly unconstitutional and void. With respect I do not agree. These regulations were made by His Majesty not under clause (2) of Article 150 but under section 2 of the Ordinance and in my judgment the fact whether or not at the time they were made Parliament was in existence or was sitting is irrelevant. His Majesty has power to make Ordinances under clause (2) of Article 150 only when Parliament is not sitting. In the case of regulations under section 2 of the Ordinance they may be made by His Majesty whether or not Parliament is sitting.

I pause here to record my observation on the meaning of the word "sitting" in clause (2) of Article 150 which was discussed and debated at length during the course of arguments. In my view the word "sitting" means sitting and actually deliberating as suggested by Encik Abu Talib.

This is made quite plain by the words "the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable" in that clause.

From the book "The Malaysian Parliament (Practice and Procedure)" by a former Clerk of Parliament, Encik Ahmad bin Abdullah, it is clear that the Malaysian Parliament is divided approximately into 5 or 6 parts, each part being called a session. Each session covers roughly a period of slightly less than one year, usually beginning in April, May or June. At the end of each session Parliament is prorogued by His Majesty by a proclamation published in the *Gazette*. After being prorogued neither House holds any meeting until a new session is summoned. The two Houses do not sit continuously throughout a session. They hold about 5 or 6 meetings in each

session. Each meeting usually lasts for about 5 to 10 days in the case of the House of Representatives and for about 3 days in the case of the Senate. However, one meeting of the session, usually the 5th meeting known as the Budget meeting, lasts for as long as 5 to 6 weeks in the House of Representatives and for one week in the Senate. It is the meeting on each day that is called a sitting.

I now turn to Mr. Wilson's ground (b). He says, alternatively, that if the 1975 regulations are subsidiary legislation (Encik Abu Talib correctly concedes they are), then as some of them are inconsistent with the constitution they are unconstitutional and void. He particularizes the unconstitutional ones as follows:

regulations 2 and 3(2), because they conflict with Article 7(1);

regulations 6, 7, 13, 19, 20 and 21, because they conflict with Article 8; and

regulation 26, because it conflicts with Article 131.

Mr. Wilson says that these regulations are not saved by clause (6) of Article 150 which provides that only Ordinances promulgated under Article 150 and Acts of Parliament passed during an emergency may be inconsistent with the Constitution, but not regulations made under an Ordinance.

With respect I do not think there is merit in this argument, even assuming that the regulations specified by Mr. Wilson are inconsistent with the constitution. There is no question but that under clause (2) of Article 150 His Majesty has power to promulgate the Ordinance and that it has the force of law. There is no question but that under clause (6), this Ordinance is valid even if it is inconsistent with any provision of the Constitution. When he promulgated that Ordinance he gave himself by its section 2 very wide powers to make essential regulations and moreover His Majesty took the precaution of providing by subsection (4) of section 2 that these essential regulations "shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the [Federal] Constitution." Because of this subsection, it is lawful in my view for His Majesty to make essential regulations that are inconsistent with the Federal Constitution.

I now turn to Mr. Wilson's ground (c). Under this he contends that if His Majesty has power under clauses (2) and (6) to make an Ordinance which is inconsistent with the Constitution, he has however no power to delegate this power to himself, as he has done by section 2(1), (2) and 4) of the Ordinance. With respect I do not agree. In my view as His Majesty has power under Article 150 to promulgate an Ordinance having the force of law even though it is inconsistent with the Constitution, he has power to delegate this power to himself.

Section 2 of the Ordinance is almost identical with section 2 of the Emergency (Essential Powers) Act No. 30 of 1964, an Act enacted by Parliament during an emergency and enacted by virtue of Article 150, and subsections (1) and (4) of the Act are almost identical with section 2 of the Ordinance, and in *Osman & Ors.* v. *Public Prosecutor*[2] it was held by the Privy Council that essential regulations made by His Majesty under section 2 of the Act are valid even if they are inconsistent with the Constitution.

On the authority of this Privy Council decision, I am of the view that there is no merit in Mr. Wilson's ground (c).

In any event, I do not think that the regulations enumerated by Mr. Wilson are inconsistent with the Constitution.

Article 7 forbids punishing a person for an act which was not punishable by law when it was done or making him liable to suffer greater punishment than was prescribed by law at the time it was committed, and in my view regulations 2 and 3 do not attempt to so punish. The acts alleged against the accused if proved were already punishable by the Internal Security Act at the time they were committed and regulations 2 and 3 do not enhance the penalty.

Article 8 guarantees to all persons equality before the law and its equal protection. Regulations 6, 7, 13, 19, 20 and 21 prescribe rules of procedure and evidence different from those applicable under the Criminal Procedure Code and the Evidence Act and to that extent they are discriminatory, but as between all persons charged with security offences within the meaning of regulation 2(1) they are not discriminatory and do not therefore offend against Article 8. It would have been different if the regulations provide that some persons charged with security offences are to be subject to one set of rules and others charged with similar offences to another set of rules.

The principle underlying Article 8 is that a law must operate alike on all persons *under like circumstances*, not simply that it must operate alike on all persons in any circumstance, nor that it "must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation", *Kedar Nath* v. *State of West Bengal*.[3] In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

It will be recalled that the definition of "security offence" by regulation 2(1) of the 1975 regulations empowers the Attorney-General to certify that an offence against any other written law affects the security of the Federation, in which event the person accused of that offence becomes liable to be tried in accordance with the rules of procedure and evidence prescribed by the 1975 regulations, and Mr. Wilson argues that this provision gives the Attorney-General an arbitrary power to discriminate against persons as to whom he has given such a certificate; but with respect I do not think that there is merit in this argument, because this power is consonant with the power expressly given to the Attorney-General by clause (3) of Article 145 which reads:

"(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

This court has dealt at length with this discretionary power of the Attorney-General in *Long bin Samat & Ors.* v. *Public Prosecutor*.[4]

Regulation 26 which provides that there shall be no appeal beyond the Federal Court in security cases is not inconsistent with Article 131 because that article does not say that every person is entitled to appeal to the Privy Council and only says that an appeal shall lie from the Federal Court to the Privy Council in any case where an appeal is allowed by Federal law.

Under ground (d) Mr. Wilson submits that the accused are charged under the Internal Security Act, that the Act was enacted in pursuance of Article 149, that any law enacted in pursuance of that article may be inconsistent only with Article 5, 9 and 10, and that as the 1975 regulations are inconsistent with articles other than 5, 9 and 10, they are accordingly void. But this argument too must fail because as I have already stated, first, subsection (4) of section 2 of the Ordinance allows His Majesty to make essential regulations that are inconsistent with any provision of the Constitution and, secondly, none of the regulations enumerated by Mr. Wilson is, in my view, inconsistent with the Constitution. In any event, the 1975 regulations were made under the authority of Article 150, and are not therefore subject to the restrictions imposed by Article 149.

Finally, I now turn to an additional ground advanced by Mr. Wilson.

He contends that under paragraph (a) of subsection (2) of section 2 of the Ordinance His Majesty may make essential provisions for the trial and punishment of persons *offending against the regulations* and indeed he may even under paragraph (c) provide for trial by special courts but again only of persons guilty of any offence *against the regulations*, but the special rules of procedure and evidence prescribed by the 1975 regulations are to be applied not to persons offending against the regulations, but against another law, namely the Internal Security Act, and that therefore they are *ultra vires* the empowering section and thus void. To this Encik Talib replies that in fact the 1975 regulations have created an offence against the regulations, to wit by reclassifying an offence against section 57 of the Internal Security Act as a security offence within the meaning of regulation 2(1) of the 1975 regulations. With respect I agree with Encik Abu Talib that these regulations are valid, not however for the reason advanced by him, but because of two reasons: first, His Majesty's power to make essential regulations under subsection (2) of section 2 of the Ordinance is not restricted to making only those regulations spelled out by that subsection. By the opening words of that subsection this power is expressed to be "without prejudice to the generality of the powers conferred [on His Majesty] by the preceding subsection", namely subsection (1), gives His Majesty very wide powers, to wit "power to make any [essential] regulations whatsoever ... which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community." Secondly, subsection (2) of section 2 itself expressly gives by paragraph (j) power to His Majesty to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification. In my judgment, section 2 is wide enough to empower His Majesty to make these imposed regulations.

I would therefore answer the question posed by the learned judge as follows:

The Essential (Security Cases) Regulations, 1975, and the Essential (Security Cases) (Amendment) Regulations, 1975, are valid:

(a) they are valid whether or not made when Parliament is sitting;

(b) by virtue of subsection (4) of section 2 of the Ordinance, the regulations are valid notwithstanding that they are inconsistent with the Constitution, but in fact the regulations enumerated by Mr. Wilson are not inconsistent with the Constitution;

(c) it is lawful for His Majesty to delegate under section 2 of the Ordinance power to himself to make regulations inconsistent with the Constitution;

(d) the regulations do not have to comply with Article 149, as they are made not under the authority of that article but under the authority of Article 150;

(e) Ordinance 1 has been properly and validly promulgated under clause (2) of Article 150 for the reasons given in *N. Madhavan Nair* v. *Government of Malaysia, supra*[1];

(f) the regulations are not *ultra vires* section 2 of Ordinance 1.

The High Court, Kuala Trengganu, should in compliance with subsection (2) of section 49 of the Courts of Judicature Act, 1964, continue and dispose of these proceedings in accordance with the judgment of this court and otherwise according to law.

Ong Hock Sim F.J.: In this Special Case formulated under section 48 of the Courts of Judicature Act (Courts of Judicature Act, 1964 — Revised — 1972, Act No. 91), the validity of the Essential (Security Cases) (Amendment) Regulations, 1975 (P.U. (A) 362/75) amending earlier Regulations published as P.U. (A) 320/75 is questioned (hereinafter referred to as the 1975 Regulations).

I need only say that the incident of May 13, 1969 led to the Proclamation of Emergency (P.U. (A) 145/69 on May 15, 1969, followed by the promulgation under Article 150(2) of the Federal Constitution of the Emergency (Essential Powers) Ordinance No. 1 of 1969 (P.U. (A) 146/69). These 1975 Regulations are challenged on the ground that they were made at a time when both Houses of Parliament have sat after the said Proclamation of Emergency and Article 150(2) only empowers the Yang di-Pertuan Agong to promulgate Ordinances, having the force of law, if satisfied that immediate action is required, until both Houses are sitting.

Article 150(2) requires the Yang di-Pertuan Agong to summon Parliament as soon as may be practicable, if Parliament is not sitting at the time of issue of a Proclamation of Emergency. The recital to Ordinance No. 1 of 1969 reads: —

"AND WHEREAS Parliament was dissolved on the Twentieth day of March, 1969, and elections to the new Dewan Ra'ayat have not been completed;"

That Ordinance is not being impugned. The propriety of invoking it for the enacting of subsidiary legislation over six years after May 13, 1969 and nearly five years after the resumption of Parliamentary rule is in question. The 1975 Regulations make serious inroads as to the mode and procedure of a trial thereunder, including the reception of evidence, to mention but a few.

The trial judge says "My own view is that since that Ordinance itself was made by virtue of the power conferred by Clause (2) of Article 150 of the Federal Constitution, that Ordinance cannot and does not give power more extensive than the power conferred by that Clause. That Clause authorises the Yang di-Pertuan Agong to legislate certain matters during a certain period. Therefore that Ordinance cannot and does not authorise the Yang di-Pertuan Agong to legislate those matters at a time outside that period. Moreover, in my view, the matters contained in the regulations must be looked at. In my view they are matters which only Parliament would have power to legislate and therefore the Yang di-Pertuan Agong is authorised by that Clause to legislate them only until both Houses are sitting."

He then referred to Penang High Court Miscellaneous Criminal Application No. 4 of 1976 where the judge said "I hold that the Emergency (Essential Powers) Ordinance No. 1 of 1969 has been promulgated under the provisions of Article 150(2) of the Federal Constitution and by reason of that the Essential (Security Cases) Regulations, 1975 are not unconstitutional and not invalid." The learned trial judge in this case differed from him and decided to refer the question to this court. He said: "In the High Court at Penang the validity of the regulations was challenged.... It appears from the learned judge's judgment that the only ground raised before him, *i.e.* it was contended that the regulations are invalid on the ground that the Emergency (Essential Powers) Ordinance No. 1 of 1969 had not been properly promulgated.... Since my own views stated above will result in a decision conflicting with that ... on the question of the validity of the regulations, in my opinion it is proper that I should refer the questions ... for favour of determination by the Federal Court." In my opinion, it was fully competent for him to decide the issue without reference to this court as his jurisdiction was equal and co-extensive with that of the Penang High Court. Here, perhaps, it would not be out of place to quote from the Lord President's "An Introduction to the Constitution of Malaysia" (2nd Edition) at page 226: —

"If a proclamation of emergency is issued when Parliament is not sitting, the Yang Dipertuan Agung must summon Parliament as soon as may be practicable. *Until both Houses of Parliament are sitting, he may promulgate* ordinances ordinances having the force of law, *if satisfied that immediate action is required.*" (The italics are mine).

Before us, arguments *in extenso* were raised to determine just when "both Houses of Parliament are sitting." Senior Federal Counsel, Encik Abu Talib urged that "sitting" should be distinguished from "meeting" and "sitting" should mean "sitting" and actually deliberating. We were referred to Article 55 and Article 62 of the Constitution and a book on the Malaysian Parliament (Practice & Procedure) by a former Clerk of Council. Sir Erskine *May's* Parliamentary Practice, page 277, was also cited for the view urged as to the meaning of "sitting". I regret I am unable to agree. Article 55 itself states that the Yang di-Pertuan Agong shall not allow six months to elapse between the last sitting in one session and the date appointed for its first meeting in the next session. In my view, Parliament would be still sitting, though a week-end recess is taken. "Until both Houses of Parliament are sitting" in Article 150(2) should be so construed to give it a meaning which is neither absurd nor impossible. Parliament is made up of the Dewan Ra'ayat and the Dewan Negara. They do not sit at the same time. I quote a passage from *Wade* and *Bradley* on Constitutional Law (8th Edition) at page 717: —

"The state of emergency is declared by proclamation.... The proclamation must be forthwith communicated to Parliament. If Parliament is not sitting, it must be summoned within five days.'

If both Houses can be summoned by the Yang di-Pertuan Agong (Parliament had been reconvened from February 20, 1971 and not one word against the feasibility and practicability of summoning it has been said), I would agree with the learned judge that there is a limitation of the Yang di-Pertuan Agong's (the Executive's) power to continue making subsidiary legislation under Ordinance No. 1, promulgated at a time when immediate action was clearly required.

The other grounds follow the beaten path, firstly, of inconsistency with the Constitution, secondly, that, as the regulations were made under sections 2(2) and 2(4), they were not valid following the maxim *"Delegatus non potest delegare,"* thirdly, non-conformity with Article 149 and lastly, that Ordinance No. 1 of 1969 was not properly or validly promulgated.

I agree that, so far as the last objection is concerned, it would appear that Chang Min Tat J.'s decision in *N. Madhavan Nair* v. *Government of Malaysia*[1] is sufficient answer.

The question of delegation was likewise dealt with in *Eng Keock Cheng* v. *Public Prosecutor*[5] where Wylie C.J. (Borneo) said: —

"The true effect of article 150 is that, subject to certain exceptions set our therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution."

At page 21, the learned Chief Justice says: —

"The Emergency (Criminal Trials) Regulations, 1964, have have been made under section 2 of the Act. Their subject-matter is clearly within the language already quoted, as they provide for special provisions in respect of procedure in criminal cases. On this subject, His Majesty has been given power to make such regulations as he deems necessary or expedient for the purposes set out in section 2, and, as has earlier been concluded, the effect of subsection (4) is that this power cannot be limited by reference to the provisions of the Constitution. Parliament has expressly enacted that the regulations are to be valid notwithstanding any inconsistency with the provisions of the Constitution, an enactment which it was not beyond the power of Parliament to make.

It is therefore unnecessary to express any opinion as to whether the regulations are inconsistent with article 8, or any other provision in the Constitution, ..."

I find this too sweeping and a little awesome. It cannot be assumed, in the absence of clear words, that Parliament has abdicated its functions to the Executive. As he himself said earlier in his judgment at pages 20-21: —

"The authority given in subsection (1) of section 2 is to make —

'any regulations whatsoever (in this Act referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.'

Subsection (2) authorises regulations on certain topics which are very wide in their scope and include —

'special provisions in respect of procedure . . . in civil and criminal cases.'

However, the power is limited to making regulations on these topics only so far as appears to His Majesty to be necessary or expedient for the purposes set out in subsection (1) which I have already quoted.

However wide this field may be, it is not all embracing and the Act does set out the policy and scope within which the power is to be exercised."

The regulations clearly fall within section 2(2)(a) and (c) as the title clearly shows. The special powers under subsection (2)(d) and (i) can only apply to offences or breaches of regulations issued under the Emergency (Essential Powers) Act and to amendments or applications for written law. Subsection (4) cannot have effect because these regulations are inconsistent with the Act itself, though inconsistencies with other written law are permitted.

In the other case of *Osman & Anor.* v. *Public Prosecutor*,[2] Viscount Dilhorne at page 138-139 said:—

"The Act expressly stated that the Essential Regulations might provide for amending, suspending or modifying any written law, and by section 2(4) declared that the Essential Regulations should have effect notwithstanding anything inconsistent therewith contained in any written law *other than the Act itself* or in any instrument having effect by virtue of any written law *other than the Act itself.*' (The italics are mine).

With respect I agree, but I would have expected the title to indicate the written law amended or modified thereby. A list of regulations made under section 2(2)(j) (*in pari materia* with section 2(2)(i) of the 1964 Act) appears at pages 8-9 of the 1969 Federal Subsidiary Legislation and supports my conclusion. I need only cite a few: —

Essential (Modifications of Immigration Laws) Regulations, 1969 — P.U. (A) 238.

Essential (Modification of Internal Security (Restriction on Processions and Meetings in a Security Area) Regulations) Regulations, 1969 — P.U. (A) 354.

Essential (Modifications of Immigration Laws) (Amendment) Regulations, 1969 — P.U. (A) 404.

Essential (Industrial Relations) Regulations, 1969 — P.U. (A) 407.

Essential (Trade Unions) Regulations, 1969 — P.U. (A) 408.

Essential (Employment) Regulations, 1969 — P.U. (A) 409.

Essential (National Land Code) Regulations, 1969 — P.U. (A) 414.

Essential (Modifications of Police Act, 1967) Regulations, 1969 — P.U. (A) 454.

Essential (Modification of the Municipal Ordinance, Federal Capital) Regulations, 1969 — P.U. (A) 486.

Essential (Land Acquisition) Regulations, 1969 — P.U. (A) 515.

Essential (National Land Code) (No. 2) Regulations, 1969 — P.U. (A) 532.

Another case before the Privy Council, *Osman & Anor. v. Public Prosecutor* (cit) also dealt with the validity of the 1964 Emergency (Criminal Trials) Regulations. There it was challenged that the regulations were inconsistent. Viscount Dilhorne in reading the judgment of the court said: —

"By article 150 of the Constitution the Yang di-Pertuan Agong was given power in certain circumstances to issue a proclamation of emergency, and, while such a proclamation was in force, Parliament was given power by article 150(5) notwithstanding anything in the Constitution, to make laws with respect to any matter if it appeared to Parliament that the law was required by reason of the emergency. Article 150(6) provided that subject to article 150(6A) (which is not relevant to this case), no provision of any Act of Parliament so passed should be invalid on the ground of inconsistency with any provision of the Constitution.

Pursuant to the powers given by this article, the Emergency (Essential Powers) Act, 1964, was passed. This gave the Yang di-Pertuan Agong wide powers of making regulations, called in the Act the Essential Regulations, which he considered desirable or expedient for securing public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.

x x x

The Emergency (Criminal Trials) Regulations 1964 were made under the Emeregency (Essential Powers) Act 1964 and if it were the case that the Regulations were inconsistent with the Constitution, nevertheless if 'written law' in section 2(4) of the Act includes the Constitution, the validity of the Regulations cannot be impeached."

As is apparent, the two decisions hinged upon the regulations offending provisions of the Constitution. It is elementary that the validity of the Emergency (Essential Powers) Act, 1964 cannot be legally challenged, as was conceded by Mr. Le Quesne in *Osman's* case (cit). But the regulations were, how-

ever, not impeached on the ground that they were *ultra vires* the Act. As *Craies* in his Statute Law (Seventh Edition) at page 307 says: —

"Since in our law Parliament is supreme the question whether a statute is constitutional cannot be argued in our courts. But the validity of rules, etc., made under statutory authority may be inquired into by the courts, though the statutory rule-making powers tend to narrow the field of inquiry by giving Ministers a wide discretion."

As Farwell L.J. said in *Dyson* v. *Attorney-General*[4] "as it is, the courts are the only defence of the liberty of the subject against departmental aggression."

I invited counsel for the defendants and the plaintiff to assist the court to determine whether the 1975 Regulations were *ultra vires* Ordinance No. 1 of 1969 at the outset of this hearing. In his written submission, and he did not elaborate, Mr. Wilson for the defendants says: —

"It is contended that the 1975 Regulations are *ultra vires* the 1969 Ordinance because Section 2(1) and 2(a), (b), (c) and (d) only give powers to the Yang di-Pertuan Agong to pass Regulations in respect of offences against the Regulations, which may create offences and provide penalties thereof. Whereas the 1975 Security Regulations provide for trials under the ISA which are not offences against the Regulations.

On this ground alone, the 1975 Regulations are *ultra vires* and invalid."

He appeared to think that there was more substance in his other grounds and he had not raised this question in the lower court. Encik Abu Talib agreed that the regulations were subsidiary legislation and the question is whether they were *ultra vires* Ordinance No. 1 of 1969. It is agreed that subsidiary legislation is as much part of the law as the statute itself (See *Halsbury's* Laws of England, 3rd edition, Volume 36 at page 486). He submitted that identical regulations in 1964 had been accepted both by the Privy Council and the Federal Court in the two cases earlier referred to. But, as I indicated, in those cases the doctrine of *ultra vires* was not raised or considered. I think I should now quote section 2(2)(a) and (c), under which to my mind, the 1975 Regulations can only have been made: —

"(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that sub-section —

(a) make provisions for the apprehension, trial and punishment *of persons offending against the regulations,* and for the detention, exclusion and deportation of persons whose detention, exclusion or deportation appears to the Minister for Home Affairs to be expedient in the interests of the public safety or the defence of Malaysia;

x x x

(c) provide for the trial by such courts as may be specified in such regulations, *of person quilty of any offence against the regulations;*" (The italics are mine).

P.U. (A) 320/75 defines a security offence to mean "an offence specified in the Schedule, or an offence in relation to which the Public Prosecutor gives a certificate under paragraph (2)." That paragraph empowered the Public Prosecutor in any particular case where a person is charged with, suspected or accused of any offence not specified in the Schedule to certify he be tried under the regulations. The Schedule contained two items, namely, (1) All offences under the Internal Security Act and (2) All offences under the Firearms (Increased Penalties) Act, 1971.

In P.U. (A) 362/75, security offence means "an offence (whether committed before or after the commencement of these regulations) against sections 57, 58, 59, 60, 61 or 62 of the Internal Security Act, 1960, or any offence against any other written law the commission of which is certified by the Attorney-General under paragraph (2) to affect the security of the Federation."

Paragraph (2) reads: —

"Where the commission of any offence against any written law other than sections 57, 58, 59, 60, 61 and 62 of the Internal Security Act, 1960, in the opinion of the Attorney-General, affects the security of the Federation, he shall issue a certificate to that effect and the case shall thereupon be dealt with and tried in accordance with these Regulations."

Regulation 2(2) in both the 1975 Regulations would appear to be a sub-delegation of power to the Public Prosecutor or Attorney-General to alter the mode of trial for any offence against existing law. No limitation was imposed under the first 1975 Regulations, though under the second, it was left to his opinion whether the offence is one affecting the security of the Federation. And if he thought so, it became mandatory to certify it for trial under the regulations. This, I would say, is sufficient to render these regulations *ultra vires* Ordinance No. 1 of 1969.

Curiously the converse is the case in Northern Ireland. The Northern Ireland (Emergency Provisions) Act, 1973 permits the Attorney-General of Northern Ireland to certify an offence not to be treated as a scheduled offence.

I would therefore rule the 1975 Regulations invalid.

It is curious that neither definition of "security offence" in P.U. (A) 320/75 and P.U. (A) 362/75 refers to an "offence against the regulations" as to which express references were made in section 2(2)(a) and (c). That omission would mean that the Attorney-General would have to certify any offence against the regulations made under Ordinance No. 1 of 1969 to make it triable under the 1975 Regulations. Certainly a cause for wonderment and strong support for the view that the specified sections of the Internal Security Act, 1960, are *not* "offences against the regulations." And, therefore, the 1975 Regulations cannot apply despite regulation 2 in view of section 2(2) of Ordinance No. 1 of 1969.

Before the High Court, Senior Federal Counsel had conceded that the 1975 Regulations were enacted pursuant to section 2(2) of Ordinance No. 1 of 1969. "In any event the 1975 Regulations only provide for procedure of trial," he continued. Here, in view of my request at the start, he has done a volte-face and now seeks to justify the regulations under section 2(2)(b) which reads "create offences" and prescribe penalties (including the death penalty) which may be imposed for any offence against any written law (including regulations made under this Ordinance)."

I find this difficult to accept. I cannot agree that by the mere definition of "security offence" expressly to include offences against sections 57 to 62 of the

Internal Security Act, 1960, offences against these sections have become "offences against the regulations" and therefore within the scope of section 2(2)(a) and (c).

I have earlier mentioned Regulation 2(2). I would add here that it ought not to be left to the unfettered discretion of the Attorney-General to determine any offence against the ordinary laws of the land to be a "security offence" and triable thereunder. That there should be certainty in the law cannot be doubted. There should be a discernible nexus between the offence and the Emergency. A man may find himself chargeable with a security offence when he is totally unaware of committing it because the Attorney-General thinks it is. The 1975 Regulations, in my view, are a denial of Parliamentary rule. They are an abrogation of the Rule of Law. If these regulations are held valid, there appears no control as to the regulations the Executive may issue under the guise of an Emergency which had ceased to exist when Parliament was reconvened on February 20, 1971.

The 1975 Regulations are clearly provisions for trial and do not create offences, and, I repeat, "offences against the regualtions" can have reference only to offences against regulations made under Ordinance No. 1 of 1969. (See for example Regulations 6(2) and 7 of P.U. (A) 160).

This can also be inferred from sections 74 and 75 of the Internal Security Act, 1960 where in section 74(1)(c) there is a reference to "an offence committed against this Act or against any provision of any written law for the time being specified in the First Schedule" and in section 75 to a person charged with "any offence against this Act or against any written law for the time being specified in the Second Schedule." Thus a clear distinction is drawn between offences against the Act and other offences to which certain provisions of the Act are to be made applicable. Subsections (2)(a) and (c) of section 2 need no other construction than the literal meaning of the words.

I find further support by reference to Emergency and War legislation here and in the United Kingdom. Section 4 of the Emergency Regulations Ordinance, 1948 reads: —

"4. (1) Where a proclamation of emergency has been made, and so long as the proclamation is in force, it shall be lawful for the Yang di-Pertuan Agong to make any regulations whatsoever which he considers desirable in the public interest and to prescribe penalties, including the death penalty, which may be imposed for any offence against any such regulation and to provide for the trial, by such courts as may be specified in such regulations, of persons guilty of such offences: Provided that no such regulation shall confer any right to punish by death fine or imprisonment without trial, and that, except in so far as such procedure may be modified by any such regulation, the existing procedure in criminal cases shall apply in respect of any breach of any such regulation or of any offence created by any such regulation in respect of which breach or offence it is sought to make the offender liable to fine or to imprisonment."

The Defence of the Realm Consolidation Act, 1914 made provision and I quote from *Rex* v. *Halliday*[7]: —

"His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations, ..."

The views of Lord Shaw of Dunfermline in his dissenting judgment were noted when new Emergency legislation was enacted on the outbreak of the Second World War. There he spoke of "offenders against the regulations" and of an "offence against the regulation."

Likewise the Emergency Powers Act, 1920 expressly enacts that: —

"(3) The regulations may provide for the trial, by courts of summary jurisdiction, of persons guilty of offences against the regulations; ...."

They confirm my view that the 1975 Regulations are therefore *ultra vires* in that they exceeded the powers conferred by Ordinance No. 1.

Lord Shaw also warned about conferring general power to legislate on the Executive and I quote: —

"The form, in modern times, of using the Privy Council as the executive channel for statutory power is measured, and must be measured strictly, by the ambit of the legislative pronouncement. And that channel itself, seeing that under the Constitution His Majesty acts only through his Ministers, is simply the Government of the day. The author of the power is Parliament: the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires* such as that which is now being tried. In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril. On all this there is no disputing."[7]

As was said by Lord Goddard L.C.J., in *Berney* v. *Attorney-General*[8]: —

"It may be, though it is not necessary to decide it, that if the competent authority, in this case a government department, use the powers given by an order under a Defence Regulation for some purpose wholly unconnected with the regulation or the order, they could not justify their action either under the regulation or under the order, as the answer would be that they were not acting under it; but if their action has to do with the purposes of the order, then I think that the only thing that a court can do is to say whether what they have done is within the words of the order itself."

In my view the extension to trial of offences other than offences against the regulations is an excess of the powers conferred under section 2(2)(a) and (c).

One further point was raised as to whether having regard to the phrase "without prejudice to the generality of the powers conferred by the preceding subsection", the very wide powers under subsection (1) conferred on the Yang di-Pertuan Agong to: —

"... make any regulations whatsoever (in this Ordinance referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community."

could validate the 1975 Regulations. In my opinion, the phrase quoted cannot have the effect to empower the Yang di-Pertuan Agong (really the Executive) not-

withstanding the explicit and restrictive terms of section 2(2)(a) and (c) of Ordinance No. 1 to enact regulations of wider scope about the very matters for which section 2(2) is expressly designed. I am unable to accept that this phrase is sufficient to override the accepted canons of interpretation that recourse can be had to the general in spite of the existence of the particular. Can it be seriously urged that if the Yang di-Pertuan Agong considers in the circumstances mentioned in section 2(1) that a special mode of trial for a special type of case (to make conviction more certain), he can disregard and ignore the limitation in section 2(2) and make regulations under section 2(1), as a result of which nothing can be held to be *ultra vires*?

This phrase is quite common and *Wade and Bradley* (cit) at page 721 say: —

"The Emergency Powers (Defence) Act, 1939 empowered the making of regulations by Order in Council which appeared necessary or expedient for the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of any war in which His Majesty might be engaged and the maintenance of supplies and services essential for the life of the community. There followed a list of particular purposes for which regulations could be made *without prejudice to the generality of the five general purposes:* these include power to make provision for the trial of offenders against the regulations and for the deetention of persons by the Secretary of State in the interests of the public safety or the defence of the realm (a tribute to the dissenting judgment of Lord Shaw in *The King* v. *Halliday).*" (The italics are mine).

Section 2(4) was also mentioned. It reads: —

"(4). An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, *other than this Ordinance* or in any instrument having effect by virtue of any written law *other than this Ordinance.*" (The italics are mine).

There is a clear inconsistency in the enacting of the 1975 Regulations, if it is sought to uphold them under section 2(1) when they are directly opposed to section 2(2)(a) and (c).

The defendants had been duly committed in accordance with the normal procedure and I think the trial should now continue, but not under the 1975 Regulations, which I have said are *ultra vires* Ordinance No. 1 of 1969.

In the net result, I would answer 4(a) in the affirmative on the ground set out but more so that the 1975 Regulations are *ultra vires* Ordinance No. 1 of 1969. I do not think it necessary to answer (b), (c) and (d) of paragraph 4 of the Special Case.

Wan Suleiman F.J.: I have had the advantage of subjecting the judgments of my learned brethren to prolonged and anxious scrutiny and must respectfully say that I am in complete agreement with the answers given by the Lord President to all the questions posed by the learned judge under section 48 of the Courts of Judicature Act No. 7 of 1964.

I should hasten to add that I am also in complete agreement with the grounds by which he has arrived at those answers.

But for the importance of the subject matter before this court, I would have said nothing more than to express my concurrence. The occasion however impels me to make comments on some of the issues before this court.

It is common to all democratic constitutions that in times of grave national emergency, normal constitutional principles must take second place to the overriding need to deal with the threat to national well-being. The Constitutional Law of England, and the Constitution of India, for instance have provisions similar to ours.

It would therefore not be out of place to rely on certain salutary rules of interpretation which have been applied to emergency legislation in such territories. Our attention has been drawn to certain passages in the well-known House of Lords decision in *Liversidge* v. *Anderson & Anor.*[9] The appellant, Liversidge who had been detained in prison under the Defence (General) Regulations, reg. 18B, which provided for the detention of persons of hostile associations, claimed a declaration that his detention was unlawful and damages for false imprisonment.

At page 366 Lord MacMillan said: — "In the first place, it is important to have in mind the regulation in question is a war measure. This is not to say that the courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time", and at page 385 Lord Romer remarked "It was indeed said on behalf of the appellant in *Greene's* case that, where an Act of Parialment is capable of more than one construction, the courts will adopt that construction which is the least likely to lead to an invasion of the liberty of the subject. That in general is a very salutary rule, but we are dealing here with an Act passed, and regulations made under it, in times of a great national emergency, and, in view of this circumstance, and of the objects which that Act and those regulations so plainly had in view, the courts should, in my opinion, prefer that construction which is the least likely to imperil the safety of this country."

These guides to interpretation are, in my view, just as applicable in the circumstances now pertaining in this country, where the emergency situation arises not from open warfare but from something just as grave — insidious and continuing subversion from within, which takes various forms, including widespread illegal possession and use of firearms.

I also have in mind what the Privy Council said in the case of *In re MacManaway*[10] which involved interpretation of section 4 of the House of Commons (Clergy Disqualification) Act, 1801 ... "The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, the context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

Applying this canon of construction and having the ones previously set out in mind, it seems to me to be abundantly clear that the opening words of section 2(2) of the Ordinance, "without prejudice to the generality of the powers conferred by the preceding subsection" is unequivocal in its meaning, and cannot be restricted to those regulations subsequently particularised in subsections (2)(a) to (2)(p) of the same section. To hold otherwise would be to defeat the manifest intention of the regulation, expressed in the clearest possible terms.

In any case subsection (2)(j) which was completely overlooked by counsel on both sides when they made their submissions, has, as the Lord President said in his judgment expressly empowered His Majesty to make essential regulations amending the law, suspending the operation of any written law and applying any written law with modification.

Clause (3) of article 150 of the Constitution states that a Proclamation of Emergency and any Ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, cease to have effect if resolutions are passed by both Houses annulling such Proclamation or Ordinance. The ultimate right to decide if an Emergency exists or has ceased to exist therefore remains with Parliament, and it is not the function of any court to decide on that issue.

Those of us who have misgivings about the sweeping powers which become vested in the Yang Dipertuan Agung (and in effect, in the Executive) after a Proclamation of Emergency, can find solace in the knowledge that the very institutions of Parliamentary democracy which we cherish can be destroyed overnight were it not for such emergency powers which the drafters of our Constitution, in their wisdom, had seen fit to embody therein. The niceties of Parliamentary democracy is a luxury which our Founding Fathers were well aware, is quite unsuited to cope with sudden national crises, which may, as in the case of the May 13th tragedy erupt with scant warning. One could only conjecture what the consequences would have been had not the Crown (and therefore the Executive) been provided with this effective remedy to nip anarchy in the bud, and then to give the body politic time to recuperate from the hurly burly of turmoil and when whole again to return to the gentler paths of parliamentary rule.

Order accordingly.

Solicitors: *Wilson & Co.*

MACON WORKS & TRADING SDN. BHD. v. PHANG HON CHIN & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) August 28, 1975]
[Ipoh — Civil Suit No. 164 of 1974]

Contract — Option — Option to purchase — Plaintiffs exercised option through defendants' solicitor — No consideration paid — Claim for specific performance of agreement resulting from exercise of option — Defendants claimed, inter alia, no privity of contract — Defendants alleged option had expired — Date of option and date of its expiry in issue.

The defendants were owners of a piece of land. Their first agreement to sell the said land to one Loong Koi was abortive and the defendants enlisted the assistance of the solicitor for Loong Koi to find a purchaser for the land. An option was given to purchase the land to one Madam Kong Yoke Sam.

The option was an open dated one exercisable only after Loong Koi showed no more interest in the land. The plaintiffs exercised the option through the said solicitor and claimed for specific performance of the agreement. The defendants resisted the claim and argued, *inter alia,* that there was no privity of contract or any contractual relationship between them and the plaintiffs. The defendants further claimed that the option had expired and even if the plaintiffs had exercised the option within the prescribed period, the option was not valid due to lack of consideration. The plaintiffs lodged a caveat against the defendants' land.

Held: (1) the option was void for lack of consideration;

(2) as far as the National Land Code is concerned the whole system of caveats is founded on the principle that they exist for the protection of *alleged* as well as proved interest. In this case, no action had been taken by the defendants to remove the caveat on the grounds that the plaintiffs had no interest in the terms of the National Land Code 1965 for capacity to lodge the caveat;

(3) the arguments of the defendants based on the lack of privity of contract cannot therefore succeed;

(4) since no time was fixed, the offer would lapse after the expiration of a reasonable time. An offer lapses after a reasonable time not because this must be implied in the offer but because failure to accept within a reasonable time implies rejection by the offeree;

(5) the court can take into account the conduct of the parties after the offer was made in deciding whether the offeree has allowed too long a time to lapse before accepting;

(6) the option had been revoked well before the purported intention to exercise the option;

(7) the plaintiffs, therefore cannot succeed in their present action and the caveat should be removed forthwith.

Cases referred to:—

(1) *Turner* v. *Forwood* [1951] 1 All E.R. 746.

(2) *Clifford* v. *Turrel* (1841) 1 Y. & C. Ch. Cas. 138; 62 E.R. 826; affd., (1845) 14 L.J. Ch. 390; 5 L.T.O.S. 281.

(3) *Currie* v. *Misa* (1875) L.R. 10 Ex. 153.

(4) *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847.

(5) *Bourne* v. *Mason* (1668) 1 Ventris 6.

(6) *Beswick* v. *Beswick* [1968] A.C. 58 at pg. 93.

(7) *Midland Silicones Ltd.* v. *Scruttons Ltd.* [1962] A.C. 446.

(8) *Mahadevan & Anor.* v. *Patel* [1975] 2 M.L.J. 207.

(9) *Jit Kaur* v. *Parl Singh* [1974] 2 M.L.J. 199, 201 col. 1 at top A to D.

(10) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145, line C; p. 146, 2nd col. D.

(11) *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh* [1974] 1 M.L.J. 145.

(12) *Khatijabai Jiwa Hasham* v. *Zenab* [1960] A.C. 317.

CIVIL SUIT.

H.R. Sankey for the plaintiffs.